INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	3
Conclusion	11

CITATIONS

Cases:

Bible v. *United States*, 314 F. 2d 106, certiorari denied, 375 U.S. 862	4
Carter v. *United States*, 231 F. 2d 232	7
Curtis, In re, 36 F. Supp. 408, affirmed, 123 F. 2d 936	6
Delli Paoli v. *United States*, 352 U.S. 232	7
Haynes v. *Washington*, 373 U.S. 503	8
Lynumn v. *Illinois*, 372 U.S. 528	8
Opper v. *United States*, 348 U.S. 84	7
United States v. *Abbamonte*, 348 F. 2d 700, certiorari denied, 382 U.S. 982	4
United States v. *Collier*, 362 F. 2d 135, certiorari denied, 385 U.S. 977	8
United States v. *Spatuzza*, 331 F. 2d 214, certiorari denied, 379 U.S. 829	7
United States v. *Ventresca*, 380 U.S. 102	11
Walker v. *United States*, 327 F. 2d 597, certiorari denied, 377 U.S. 956	11

Constitution, statute and rule:

U.S. Constitution, Sixth Amendment	6

268-311—67

Constitution, statute and rule—Continued

	Page
21 U.S.C. 174	2
F. R. Crim. P., Rule 41(e)	10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 134

HOMER PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 375 F. 2d 75.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1967. A petition for rehearing was denied on April 5, 1967. The petition for a writ of certiorari was filed on May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, proof of an earlier transaction in narcotics was admissible to show

defendant's knowledge of the existence of, and his dominion over, narcotics.

2. Whether petitioner was denied a fair and impartial trial because of inadvertent references to facts from which the jury could have deduced that he had a criminal record, or because of misconduct on the part of one juror, who was subsequently dismissed.

3. Whether petitioner's admission to arresting agents was properly received in evidence.

4. Whether petitioner was improperly denied a hearing on his motion to quash a search warrant and to suppress evidence and whether the search warrant was based on probable cause.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of concealing a narcotic drug in violation of 21 U.S.C. 174. On January 31, 1966, he was sentenced to imprisonment for ten years. The court of appeals affirmed the conviction, one judge dissenting (Pet. App. A).

Petitioner was observed entering, in the early morning hours of April 24, 1964, a building at 8004 South Yale Street in Chicago. Approximately ten minutes later he left the building and drove to the New Waikiki Lounge. He was observed there handing an aluminum foil package to his brother, Tommie Lee Phillips, who then drove away with one Johnny Littleton. When federal narcotics agents halted the automobile and announced their identity, Tommie Lee Phillips fled. During his flight, he threw an aluminum foil

package over a small fence. The package was recovered and was found to contain an opium derivative (A. 39–42).[1]

Narcotics agents continued the surveillance of the building at 8004 South Yale Street on the following day. At approximately 3:00 p.m. agents Przibórowski and Pringle arrived with a search warrant. They rang the door bell three times without eliciting any response. Agent Pringle then knocked on the door and announced his office, again without receiving any response. The agents then kicked in the door and, as they were entering, encountered co-defendant Melsia Delaney as she was approaching from the kitchen. Pringle again announced his office, and conducted a search. A manila envelope containing 126.3 grams of heroin hydrochloride was found in a telephone book (A. 43, 45, 62–64, 77). Mrs. Delaney denied knowledge of the presence of the narcotic drug and denied knowing petitioner (A. 44). When petitioner was arrested two days later, he admitted possession of the narcotics found at Mrs. Delaney's apartment and stated that he had lived there at one time (A. 46). The indictment charged petitioner and Mrs. Delaney[2] with concealing the 126.3 grams found in her apartment.

ARGUMENT

1. The testimony regarding petitioner's departure from the apartment, his handing his brother a pack-

[1] "A." designates appellant's appendix; "R.", the transcript of record on appeal; "Tr.", the transcript of trial; and "M. Tr.", the transcript of miscellaneous proceeding. All are on file with the Clerk of this Court.

[2] Mrs. Delaney was convicted by the jury, but a new trial was ordered as to her.

age of narcotics, and the eventual recovery of the package, was properly admitted as bearing on petitioner's knowledge of the existence of, and his dominion and control over, the narcotics later found in the search of the apartment. In view of the fact that petitioner was not in the apartment when the drugs were found, and that Mrs. Delaney denied knowing petitioner, it was clearly relevant to prove that petitioner had used the very apartment to carry on a trade in narcotics. It was within the discretion of the trial court to permit introduction of evidence of a similar and connected crime that tended to prove an element of the crime for which the defendant was being tried—knowledge of and dominion and control over the narcotics found in the apartment. See *United States* v. *Abbamonte*, 348 F. 2d 700, 704 (C.A. 2), certiorari denied, 382 U.S. 982; *Bible* v. *United States*, 314 F. 2d 106, 108–110 (C.A. 9), certiorari denied, 375 U.S. 862.[3]

During cross-examination of Agent Hill (who had recovered the aluminum foil package thrown by Tommie Lee Phillips), it was emphasized that petitioner was not being tried for that alleged transfer of

[3] Petitioner suggests (Pet. 15) that there was no evidence showing that the aluminum foil package actually contained an opium derivative. As petitioner concedes, the agent testified that he submitted the package to the U.S. Chemist, and the Chemist testified that he received a package from the agent. Petitioner contends that there was no direct proof that the package which the agent submitted to the Chemist—the package recovered from Tommie Lee Phillips—was the same package received by the Chemist. But the jury could reasonably conclude that the package which the agent submitted to the Chemist and the package the Chemist received and analyzed were one.

heroin to his brother.[4] During closing argument, the Assistant United States Attorney stated that the evidence relating to the Tommie Lee Phillips episode was offered solely to show petitioner's dominion and control over Mrs. Delaney's apartment and his knowledge that narcotics were concealed in it (Tr. 733, 736–737, 792–793). And in its instructions the trial court charged the jury (A. 91, 96):

> Before a defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act.
>
> * * * * *
>
> Now, the indictment charges the defendant with a crime of possession or concealment of narcotics which has been heretofore defined in these instructions. Each defendant is on trial only for the crime that is charged in the indictment and you must decide whether the government has proved that he or she is guilty of that particular crime and beyond a reasonable doubt of that crime alone.

Thus, the instructions of the trial court, amplified by argument of counsel on both sides, emphasized to the jury that petitioner was being tried for the conceal-

---

[4] The following colloquy took place (Tr. 203–204):

> Q. [By Mr. Pincham, defense counsel]. Now neither of these defendants are here charged with having transferred or dispensed that object to Tommie Lee Phillips, are they?
>
> * * * * *
>
> A. [By Agent Hill]. No, sir.

ment of narcotics in Mrs. Delaney's apartment and for that crime alone.

Petitioner charges that the evidence of the earlier narcotics transaction took him unfairly by surprise. But he was fully apprised of the transaction prior to trial, in connection with his motion to quash the search warrant, and, although advised by the government's opening statement that the government would offer this evidence as proof of petitioner's knowledge (Tr. 12, 24–26), he did not seek a continuance or otherwise move for additional time in which to prepare a defense. Nor was he denied his Sixth Amendment right to confrontation. The government was not required to call Tommie Lee Phillips. See *In re Curtis*, 36 F.Supp. 408 (D. D.C.), affirmed, 123 F. 2d 936 (C.A. D.C.). And both Pringle and Hill—who testified to the events surrounding the Tommie Lee Phillips episode—were cross-examined by petitioner. Finally, petitioner was not deprived of his right to compulsory process since he did not seek process at any time to compel the attendance of Tommie Lee.

2. During the direct examination of Agent Pringle concerning the circumstances surrounding petitioner's admission (discussed *infra*, p. 8), Pringle testified that petitioner, in refusing to make a written statement, had said, "No, I don't want to *go back to jail either.*" (A. 64; emphasis added.) Later, on cross-examination, in response to a question posed by petitioner's counsel, Pringle testified that petitioner had known him prior to the arrest for the crime charged herein (A. 73). Petitioner contends

that the government was deliberately attempting to communicate to the jury that petitioner had had previous brushes with the law. We disagree.

Pringle's comment that petitioner had said that he did not want to go back to jail was merely an incident of the agent's description of the circumstances of the admission. It is clear from the context that it was not a deliberate attempt to prejudice petitioner in the eyes of the jury. In any event, at petitioner's request, the entire conversation was stricken from the record, and the jury was admonished to disregard the statement completely (A. 65–66). Presumably, these instructions were obeyed. *Opper* v. *United States,* 348 U.S. 84, 95; see, also, *Delli Paoli* v. *United States,* 352 U.S. 232, 242. Pringle's testimony that petitioner had known him prior to the arrest did not necessarily imply that petitioner had a criminal record. Since the statement was responsive to a question posed by petitioner's counsel, petitioner should not be heard to complain. *United States* v. *Spatuzza,* 331 F. 2d 214, 216–217 (C.A. 7), certiorari denied, 379 U.S. 829; *Carter* v. *United States,* 231 F. 2d 232 (C.A. 5).

3. Shortly after the court admonished the jury to disregard Pringle's statement that petitioner had said he didn't want to go back to jail, one of the jurors was observed to smile at Pringle and say, "You better watch that stuff", or "You ought to watch that", or words to that effect (A. 66). The court dismissed the juror, but denied petitioner's motion for a mistrial based on the incident (A. 69–70). Since the juror did not participate in the determination of petitioner's

guilt or innocence, there is no basis for a claim of prejudice. See *United States* v. *Collier*, 362 F. 2d 135, 137–138 (C.A. 7), certiorari denied, 385 U.S. 977.

4. Upon his arrest two days after the narcotics were found concealed in Mrs. Delaney's apartment, petitioner said that he did not want to see her go to jail and admitted that the narcotics were his (A. 45–46).[5] Petitioner contends that this admission was inherently involuntary and inadmissible since the statement was induced by the fear that his "girl friend" might otherwise go to jail (Pet. 26–27). No threats were made by government officials that if petitioner did not admit ownership of the narcotics Mrs. Delaney would go to jail. His statement was voluntarily and spontaneously given; any "compulsion" was within him.[6]

5. Prior to trial, petitioner's co-defendant moved to quash the search warrant and suppress the heroin found in her apartment. The motion was denied without prejudice (R. 68). The court thereafter granted petitioner's motion to join in and adopt his co-defendant's motion to suppress (R. 71). In a pre-trial argument with respect to the validity of the search warrant, the following colloquy occurred (M. Tr. 42):

---

[5] Q. [By Mr. Plunkett]. After that discussion, did you have further discussions?

A. [By Agent Hill]. Yes, sir. Agent Pringle asked Phillips if the heroin belonged to him and * * * [h]e first said no, then he said he didn't want to see Ruth go to jail. He said it was his stuff.

[6] *Haynes* v. *Washington*, 373 U.S. 503, and *Lynumn* v. *Illinois*, 372 U.S. 528, are thus inapposite, since in both cases the compulsion which caused the confession or admission was brought to bear by government officials.

> The COURT. Let's see, this motion was made by your co-counsel—what is his name:
>
> Mr. PINCHAM. Mr. Gerber, yes.
>
> The COURT. Mr. Gerber. It was a motion to suppress. It alleged that the search warrant was invalid. However, under the principles laid down in the [*Ventresca*] case [*United States* v. *Ventresca*, 380 U.S. 102] I find that it was not and I deny the motion without prejudice. Of course it is always without prejudice. We will hear the case. We will try the case.

On another occasion, prior to trial, this colloquy occurred (M. Tr. 72–73):

> The COURT. There is a motion to suppress in this, isn't there, that I will have to hear? Has that been denied on the face of the petition?
>
> Mr. PINCHAM. Your Honor denied the motion on the face of the petition.
>
> The COURT. Without prejudice to listen to it in the trial of the case?
>
> Mr. PINCHAM. That is right, yes.
>
> The COURT. So actually it is just a matter of trying the case.
>
> Mr. PINCHAM. That is what it boils down to.

When the government offered the seized narcotics for admission into evidence, petitioner's counsel objected "for the reasons and on the grounds relied upon and urged and set forth in the petition of the defendants to quash the search warrant and to suppress the evidence" (Tr. 444–445).

Petitioner now contends that he did not know that the trial judge was hearing the motion to suppress

together with the trial of the case,[7] and that he was therefore denied an opportunity to present further evidence with respect to that motion. But from the quoted colloquies it is apparent that petitioner's counsel was fully aware that the trial court was hearing the motion to suppress during trial, as permitted by F.R. Crim. P. 41(e), and that he deliberately waived the presentation of further evidence on that issue. At all events, the only issue raised with regard to the search, besides the validity of the warrant (see *infra,* pp. 10–11), concerned the execution of the search, and on that point Mrs. Delaney testified for the defendants. Even now petitioner does not suggest that he had other witnesses to testify regarding the validity of the search, and accordingly there is no basis for any claim that he was prejudiced.

6. Petitioner's contention that the search warrant was not supported by probable cause is without merit. The affiant, agent Pringle, alleged, *inter alia,* that he had observed known narcotic peddlers enter 8004 South Yale Street, that he knew petitioner Phillips as a convicted dealer of narcotics, and that he knew that petitioner had resided at that address some time before. Pringle also alleged in detail the circumstances of the Tommie Lee Phillips episode in which petitioner, after leaving 8004 South Yale Street, handed his brother an aluminum foil package of a kind commonly used in the narcotics trade which was recovered and found to contain an opium derivative

[7] At a post-trial motion, Judge Parsons advised counsel that he had in fact heard the motion to suppress during the trial (A. 98–99).

(A. 14–16; Pet. App. D). In these circumstances, the commissioner was clearly and adequately advised of detailed facts, known personally to the affiant, upon which a finding of probable cause for a search of the apartment could properly be based. *United States* v. *Ventresca,* 380 U.S. 102; *Walker* v. *United States,* 327 F. 2d 597 (C.A. D.C.), certiorari denied, 377 U.S. 956.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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